STATE PERSONNEL BOARD, STATE OF COLORADO Case No. 2001B064

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

MARY LAEL VAN RIPER,

Complainant,

VS.

DEPARTMENT OF PUBLIC HEALTH & ENVIRONMENT,

Respondent.

Hearing was held on April 12, 2001 before Administrative Law Judge Kristin F. Rozansky at the offices of the State Personnel Board, 1120 Lincoln, Suite 1420, Denver, Colorado.

MATTER APPEALED

Complainant, Mary Lael Van Riper ("Complainant" or "Van Riper") appeals her displacement by Department of Public Health & Environment ("Respondent" or "DPHE").

For the reasons set forth below, Respondent's action is **rescinded**.

PRELIMINARY MATTERS

Joseph Q. Lynch, Assistant Attorney General, 1525 Sherman Street, 7th Floor, Denver, Colorado represented Respondent. David Lichtenstein represented Complainant. Complainant was present for the evidentiary proceedings.

PROCEDURAL MATTERS

A. Witnesses

Complainant called the following witnesses:

- 1. Courtney Thomas, former CDPHE employee and Complainant's former supervisor.
- 2. Norma Edelman, former CDPHE employee.

3. Complainant testified on her own behalf.

Respondent called Elizabeth Coronado Amesquita, Human Resource Specialist, Human Resources, CDPHE, as a witness and Laura Benallo, GPIV in Human Resources for General Support Services, Department of Personnel, as an expert witness.

A witness sequestration order was entered.

B. Exhibits

Complainant's Exhibits A, B, C, D, E, G, P-1, P-2, P-3, P-4 and Q were admitted by stipulation. Exhibit O was admitted without objection.

Respondent's Exhibits 1 through 7 and 9 were admitted by stipulation. Exhibits 8 and 10 were admitted without objection.

ISSUES

- 1. Whether Respondent's action was arbitrary, capricious or contrary to rule or law;
- 2. Whether attorney fees are warranted.

FINDINGS OF FACT

Findings of fact contain a parenthetical citing the testimony of the witness or exhibit upon which, at least in part, that finding of fact is based.

General Background

- 1. Complainant was hired by the CDPHE in July 1980 as a Community Worker B. *Complainant*
- 2. As a Community Worker B Complainant worked for the Early and Periodic Screening and Diagnostic Testing ("EPSDT") program. *Complainant*
- 3. The EPSDT program is a Medicaid program that provides outreach services for children. *Thomas*
- 4. From 1990 to 1997, Courtney Thomas was Complainant's supervisor. *Thomas*
- 5. In 1990 the federal funding for the EPSDT program was cut, thus allowing funding for only a half-time position. *Complainant*
- 6. After the cut in funding, Complainant continued to work full-time for CDPHE,

- working half-time on the EPSDT program, with Courtney Thomas as her supervisor, and half-time as an Administrative Clerk II for CDPHE's Health Facilities Division in Grand Junction. *Complainant*
- 7. Beginning in 1992, Norma Edelman was the training officer for the EPSDT program, training one hundred managers in sixty-three counties. *Edelman*
- 8. In 1994 it was determined that an additional trainer was needed and Complainant was selected because of her seniority with the EPSDT program. *Edelman*
- 9. Complainant's 7/1/93 to 6/30/94 evaluation has an overall "commendable" rating. Exhibit O
- 10. Thomas prepared the 7/1/93 to 6/30/94 evaluation. *Thomas*
- 11. In the evaluation she states "[b]eginning in October Lael will be fulltime with the EPSDT program to continue her duties as EPSDT case manager for Montrose County...." Exhibit O
- 12. Complainant seeks reinstatement, back pay and benefits, and attorney fees.

Complainant's October 1994 Separation From State Employment

- 13. At the end of September 1994, Complainant resigned her half-time Administrative Clerk II position for CDPHE's Health Facilities Division and her supervisors for that position submitted a personnel action form transferring her leave balances to her EPSDT position. *Complainant and Exhibit P-1*
- 14. At the end of September 1994, Complainant's EPSDT supervisors submitted a personnel action form to change Complainant's half-time Community Worker II for one month to a full-time position. *Thomas and Exhibit P-2*
- 15. Thomas, Complainant's supervisor, had no idea what would happen to Complainant's position at the end of the one-month period. *Thomas*
- 16. Towards the end of October there was an issue about the FTE allocation for the EPSDT program. *Thomas*
- 17. As of October 1, 1994, CDPHE had the funding for Complainant's EPSDT work, because the federal fiscal year for that funding began on October 1, 1994. *Edelman*

- 18. However, as of October 1, 1994, CDPHE did not have the FTE allocation for Complainant's EPSDT work because the state fiscal year did not begin until July 1, 1995, after the federal funding was received. *Edelman*
- 19. In order to continue having the Complainant's EPSDT work done after October 1, 1994, CDPHE had to contract with Tri-County Health Department. *Edelman*
- 20. Portions of the EPSDT program were contracted to Tri-County Health already so the contract was simply increased to pay for Complainant. *Edelman*
- 21. There was a one-month lag period from October 1, 1994, to November 1, 1994, while the contract between CDPHE and Tri-County Health Department was negotiated. Edelman
- 22. Complainant signed a form entitled "Colorado Department of Health Resignation Form" stating that she was resigning her Community Worker position to "transfer to contract with Tri-County no medical insurance through them," effective October 31, 1994. *Complainant and Exhibit 2*
- 23. Complainant does not recall receiving a payment from CDPHE during this time period for her accrued annual leave. *Complainant*
- 24. Complainant's supervisors submitted a personnel action form, effective October 31, 1994, stating that Complainant had resigned from her position as a Community Worker II. *Thomas and Exhibits P-3 and 5*
- 25. This personnel action form was initiated by CDPHE's fiscal officer and signed by Complainant's supervisor, her supervisor's supervisor and then by someone in Human Resources. The form was prepared and signed because Complainant had become a contract employee for Tri-County Health Department. *Thomas*
- 26. At no time did anyone discuss with Complainant that she would lose her seniority by working in the contract position or that when she returned to CDPHE, it would be on a probationary basis. *Thomas*
- 27. Complainant's position with EPSDT was federally funded. *Edelman*
- 28. The federal funding was paid to CDPHE who paid it to Tri-County who then paid Complainant. *Edelman*
- 29. While working for Tri-County Health Department, Complainant continued to report to Edelman and Thomas at CDPHE, and her EPSDT job duties and responsibilities after October 31, 1994 were not substantially different from her job duties and responsibilities before October 31, 1994. Thomas and Complainant

- 30. After October 31, 1994, Complainant received her health insurance benefits by participating in COBRA. *Complainant*
- 31. Complainant's evaluation for her three month introductory period, with an overall rating of "solid performer," was completed by Norma Edelman of CDPHE, signed by Courtney Thomas of CDPHE, and prepared on Tri-County Health Department's Employee Performance Appraisal form. *Edelman and Exhibit E*
- 32. Effective June 1, 1995, Complainant was appointed, on a probationary basis, to a Social Work Associate/Intern position with CDPHE. *Thomas, Exhibits P-4, 6 and 7*
- 33. After June 1, 1995, Complainant received her paychecks from CDPHE. *Complainant*
- 34. Complainant did not fill out an application prior to her appointment to the Social Work Associate/Intern position. *Complainant*
- 35. At no time after June 1, 1995, did anyone at CDPHE inform Complainant that her seniority dated from June 1, 1995. *Complainant*

Complainant's Displacement

- 36. On December 21, 2000, Bruce Guernsey, Complainant's supervisor, called Complainant to say that she had been displaced or "bumped" by another state employee, Mary Jane Place, with more seniority, effective January 31, 2000. *Complainant*
- 37. On December 22, 2000, by certified mail, Complainant was notified of her displacement. *Complainant and Exhibit 1.*
- 38. Elizabeth Coronado Amesquita works in Human Resources for CDPHE and has delegated authority to process layoffs for CDPHE. *Amesquita*
- 39. Prior to Complainant's displacement, Place's position was abolished due to lack of funding. *Amesquita*
- 40. After determining that Complainant was the only other person in Place's class, Amesquita, utilizing Board rules and noting that Complainant was terminated in 1994 and appointed in 1995, determined that Place was senior to Complainant and she offered Place Complainant's position. *Amesquita*
- 41. Place accepted the position. Amesquita

- 42. After Place accepted the position, Amesquita reviewed Complainant's previously certified positions and found an Administrative Assistant II position in Denver which was offered and refused by Complainant. *Amesquita*
- 43. Complainant called Amesquita and asked why her service prior to 1995 was not considered. *Amesquita*
- 44. When Amesquita appointed Complainant in 1995 she saw the computer generated application dated 4/10/95 by Complainant for the Social Work Associate/Intern position; however, she did not look for it or see it in December 2000 when she was processing Complainant's layoff. *Amesquita*
- 45. Amesquita saw Complainant's resignation letter while she was researching the layoff but did not investigate the circumstances behind the resignation, as that is not part of her job duties. *Amesquita*
- 46. Complainant's PERA statement dated July 31, 2000, states that she has Earned Service Credit of 20 years.
- 47. Complainant's Employee History Report shows "Community Worker B" as falling within the "A8481A/X" class. *Exhibit* 7
- 48. Complainant's and Place's Employee History Reports show "Social Work Associate/Intern" as falling within the "C5H1TX" class. *Exhibits 7 and 9*

Expert Witness Testimony

49. Laura Benallo, GPIV in Human Resources for General Support Services, Department of Personnel, was qualified as an expert in advising departments on R-7-14 with regards to what constitutes "continuous service."

DISCUSSION

I. **GENERAL**

Certified state employees have a property interest in their positions and may only be terminated for just cause. Colo. Const. Art. 12, §§ 13-15; §§ 24-50-101, et seq., C.R.S.; Department of Institutions v. Kinchen, 886 P.2d 700 (Colo. 1994).

A. Burden of Proof

In this appeal of Complainant's termination by displacement, the Complainant has the burden to prove by preponderant evidence that her termination was arbitrary, capricious or contrary to rule or law. See <u>Department of Institutions v. Kinchen</u>, 886 P.2d 700 (Colo. 1994); § 24-50-103(6), C.R.S. In determining whether an agency's

decision is arbitrary or capricious, a court must determine whether a reasonable person, upon consideration of the entire record, would honestly and fairly be compelled to reach a different conclusion. If not, the agency has not abused its discretion. McPeck v. Colorado Department of Social Services, 919 P.2d 942 (Colo. App. 1996).

It is for the administrative law judge, as the trier of fact, to determine the persuasive effect of the evidence and whether the burden of proof has been satisfied. Metro Moving and Storage Co. v. Gussert, 914 P.2d 411 (Colo. App. 1995).

B. Credibility

The credibility of the witnesses and the weight to be given their testimony are within the province of the administrative law judge. <u>Charnes v. Lobato</u>, 743 P.2d 27 (Colo. 1987). In determining credibility of witnesses and evidence, an administrative law judge can consider a number of factors including:

- 1. A witness' means of knowledge;
- 2. A witness' strength of memory;
- 3. A witness' opportunity for observation;
- 4. The reasonableness or unreasonableness of a witness' testimony;
- 5. A witness' motives, if any:
- 6. Any contradiction in testimony or evidence;
- 7. A witness' bias, prejudice or interest, if any;
- 8. A witness' demeanor during testimony;
- 9. All other facts and circumstance shown by the evidence that affect the credibility of a witness.

II. HEARING ISSUES

A. The Appointing Authority's action was arbitrary, capricious, or contrary to rule or law.

The primary issue in this matter is whether or not Complainant has continuous state service since 1980. The Complainant argues the time period from November 1994 through May 1995 should not constitute a break in service and that Complainant continued to work for CDPHE during that time period. Respondent argues that Complainant voluntarily resigned from her position and did not work for the state for a seven-month period.

Respondent treated Complainant as if she had never left state service. The most pointed way in which Respondent did this is the manner in which she was "appointed" in July 1995 to the Social Work Associate/Intern vacancy. Under Board Rule R-4-5, appointing authorities may fill vacancies by transfer, demotion, reappointment, reinstatement, temporary appointment, or appointment from an employment list. The only possible procedures for Complainant's "appointment" in June 1995 are a transfer,

reappointment or reinstatement. Complainant was not demoted, her "appointment" was not temporary and there is no evidence that Respondent conducted an examination and, through the open competitive process, compiled an employment list from which Complainant was appointed. However, Respondent also did not follow any of the Director of Personnel's Procedures for transfers, reappointments or reinstatement.

Respondent's witness, Ms. Amesquita, referred to Complainant as having been "appointed" to the position of Social Work Associate/Intern in June 1995. In October 1994, when Respondent argues that Complainant resigned from state service, she was classified as a "Community Worker B." Respondent's Exhibits 7 and 9 show that these two positions are in different classes.

Under Director's Procedure P-4-5, a transfer "is an appointment of a qualified employee to a different position in the same class or with the same job rate." A Social Work Associate/Intern and a Community Worker B are not the same class. Under Director's Procedure P-4-7, a reappointment "is a discretionary appointment of a certified employee back into the class from which [she was] voluntarily demoted." There is no evidence that Complainant was voluntarily demoted from her Community Work B position. Even if there were such evidence, Complainant was not appointed back into that class. Under Director's Procedure P-4-8, a reinstatement "is a discretionary appointment to the same or equivalent class from which a former certified employee resigned in good standing." Complainant was not "appointed" to the same class from which she "resigned." If Complainant truly was deemed by Respondent to have resigned, Respondent should have gone through the open competitive process prior to "appointing" Complainant to the position in June 1995. By not following any of the procedures outlined in Board Rule R-4-5 and implemented by Director's ProceduresP-4-5; P-4-7 and P-4-8, or going through the open competitive process, Respondent treated Complainant as a state employee with no break in her service since 1980.

During the summer of 1994 CDPHE wanted to have a full time trainer for the EPSDT program. Complainant's own evaluation completed during that time period shows that it was expected that Complainant would fill that position. The problem was that, given the different fiscal years for Colorado and the federal government, it did not have an FTE allocation for the position from the state legislature, but it did have the federal funding for the position. Complainant's "resignation" accomplished three goals for CDPHE. First, it was able to continue to provide the EPSDT program services offered by Complainant. Second, it was able to avoid the paperwork of a layoff and the displacement of other CDPHE employees if Complainant had not "resigned." Third, it did not have to go through the hiring process in June 1995 for the Social Work Associate/Intern position and the subsequent training and education of whomever was hired to fill that position. Apart from continuing to do the work she enjoyed, Complainant does not seem to have accrued any benefit from assisting CDPHE in those three goals. In fact, by resigning rather than forcing CDPHE through the layoff process, she appears, in CDPHE's eyes, to have given up any seniority or reemployment rights that she would accrue from a lavoff.

Finally, it is worth noting that Complainant was, understandably, unaware that her seniority rights had been so drastically affected. If she had been aware, she may not have been so cooperative about submitting her "resignation" and ending over fourteen years of state service. Her evaluations continued to be done by the same people who had supervised her before her "resignation." She continued to report to the same people at CDPHE that she had reported to prior to her "resignation." She had little or no interaction with Tri-County Health Department. Her job duties and responsibilities remained the same. Her PERA annual statements reflected no break in service. In June 1995 she did not have to go through any type of open competitive process for her "appointment."

Respondent qualified Laura Benallo, GPIV in Human Resources for General Support Services, Department of Personnel, as an expert in advising departments as to what constitutes "continuous service" under Board Rule R-7-14. Board Rule R-7-14 defines continuous service as including

permanent status and certain state employment outside the state personnel system when there is no break in service. Included is any break in classified service for a certified employee of less than 90 days, time on a departmental reemployment list or waiting for retention rights, and approved leave. If there is a break in service for a certified employee of more than 90 days, previous state service does not count toward seniority.

Board Rule R-7-14(A), 4 CCR 801.

Benallo was given the following hypothetical:

A certified employee, who works for CDPHE, resigns as a Community Worker B on October 31, 1994 with a lump sum payment and becomes a contract employee for Tri-County Health Department. While with Tri-County she receives annual, sick or health benefits from Tri-County, not from the state. In June 1995 she is hired as a probationary Social Work Associate Intern.

Based upon this hypothetical, Benallo opined that CDPHE does not need to put her on the reemployment list on October 31, 1994; she does not have retention rights because she was not separated through a layoff, and CDPHE is not obligated to give her retention rights; she is not on approved leave; and she has had a break in continuous service.

The expert's opinion did not address the manner in which Complainant was "appointed" as a Social Work Associate Intern. In addition, it is based, in part, on the assumption that she was receiving her health insurance benefits from Tri-County, when in fact she was receiving them from COBRA. Finally, it does not address the issue of how CDPHE dealt with the disconnect between the timing of receiving the federal funding and the timing of the FTE allocation from the state legislature. All of these are material facts which when included in the hypothetical change the analysis under Board Rule R-7-14.

Respondent treated Complainant as if she had continuous service. Complainant, based upon her high ratings in her evaluations, was an asset to CDPHE. In addition, Complainant's twenty years of experience have benefited Respondent and the EPSDT program. Based upon the analysis above, it is found that the appointing authority's action was arbitrary, capricious, or contrary to rule or law.

B. Attorney fees are not warranted in this action.

Attorney fees are warranted if an action was instituted frivolously, in bad faith, maliciously, or as a means of harassment or was otherwise groundless. § 24-50-125.5, C.R.S. and Board Rule R-8-38, 4 CCR 801.

Given the above findings of fact an award of attorney fees is not warranted.

CONCLUSIONS OF LAW

- 1. Respondent's action was arbitrary, capricious, or contrary to rule or law.
- 2. Attorney's fees are not warranted.

ORDER

Respondent's action is **rescinded**. Complainant is reinstated with full back pay and benefits. Attorney fees and costs are not awarded.

Dated this 24th day of May, 2001.

Kristin F. Rozansky Administrative Law Judge 1120 Lincoln Street, Suite 1420 Denver, CO 80203

NOTICE OF APPEAL RIGHTS

EACH PARTY HAS THE FOLLOWING RIGHTS

- 1. To abide by the decision of the Administrative Law Judge ("ALJ").
- 2. To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is mailed to the parties. Section 24-4-105(15), C.R.S. Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is mailed to the parties. Both the designation of record and the notice of appeal must be received by the Board no later than the applicable twenty (20) or thirty (30) calendar day deadline. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), C.R.S.; Rule R-8-58, 4 Code of Colo. Reg. 801. If the Board does not receive a written notice of appeal within thirty calendar days of the mailing date of the decision of the ALJ, then the decision of the ALJ automatically becomes final. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990).

PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ may be filed within 5 calendar days after receipt of the decision of the ALJ. The petition for reconsideration must allege an oversight or misapprehension by the ALJ. The filing of a petition for reconsideration does not extend the thirty-calendar day deadline, described above, for filing a notice of appeal of the decision of the ALJ.

RECORD ON APPEAL

The party appealing the decision of the ALJ must pay the cost to prepare the record on appeal. The fee to prepare the record on appeal is **\$50.00** (exclusive of any transcription cost). Payment of the preparation fee may be made either by check or, in the case of a governmental entity, documentary proof that actual payment already has been made to the Board through COFRS.

Any party wishing to have a transcript made part of the record is responsible for having the transcript prepared. To be certified as part of the record, an original transcript must be prepared by a disinterested, recognized transcriber and filed with the Board within 45 days of the date of the designation of record. For additional information contact the State Personnel Board office at (303) 894-2136.

BRIEFS ON APPEAL

The opening brief of the appellant must be filed with the Board and mailed to the appellee within twenty calendar days after the date the Certificate of Record of Hearing Proceedings 2001B064

is mailed to the parties by the Board. The answer brief of the appellee must be filed with the Board and mailed to the appellant within 10 calendar days after the appellee receives the appellant's opening brief. An original and 7 copies of each brief must be filed with the Board. A brief cannot exceed 10 pages in length unless the Board orders otherwise. Briefs must be double-spaced and on 8 □ inch by 11-inch paper only. Rule R-8-64, 4 CCR 801.

ORAL ARGUMENT ON APPEAL

A request for oral argument must be filed with the Board on or before the date a party's brief is due. Rule R-8-66, 4 CCR 801. Requests for oral argument are seldom granted.

CERTIFICATE OF MAILING

This is to certify that on the _____ day of May, 2001, I placed true copies of the foregoing INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE and NOTICE OF APPEAL RIGHTS in the United States mail, postage prepaid, addressed as follows:

David Lichtenstein 303 East Seventeenth Avenue, Suite 1070 Denver, Colorado 80203

and in the interagency mail, to:

Joseph Q. Lynch Assistant Attorney General Employment Law Section 1525 Sherman Street, 7th Floor Denver, Colorado 80203